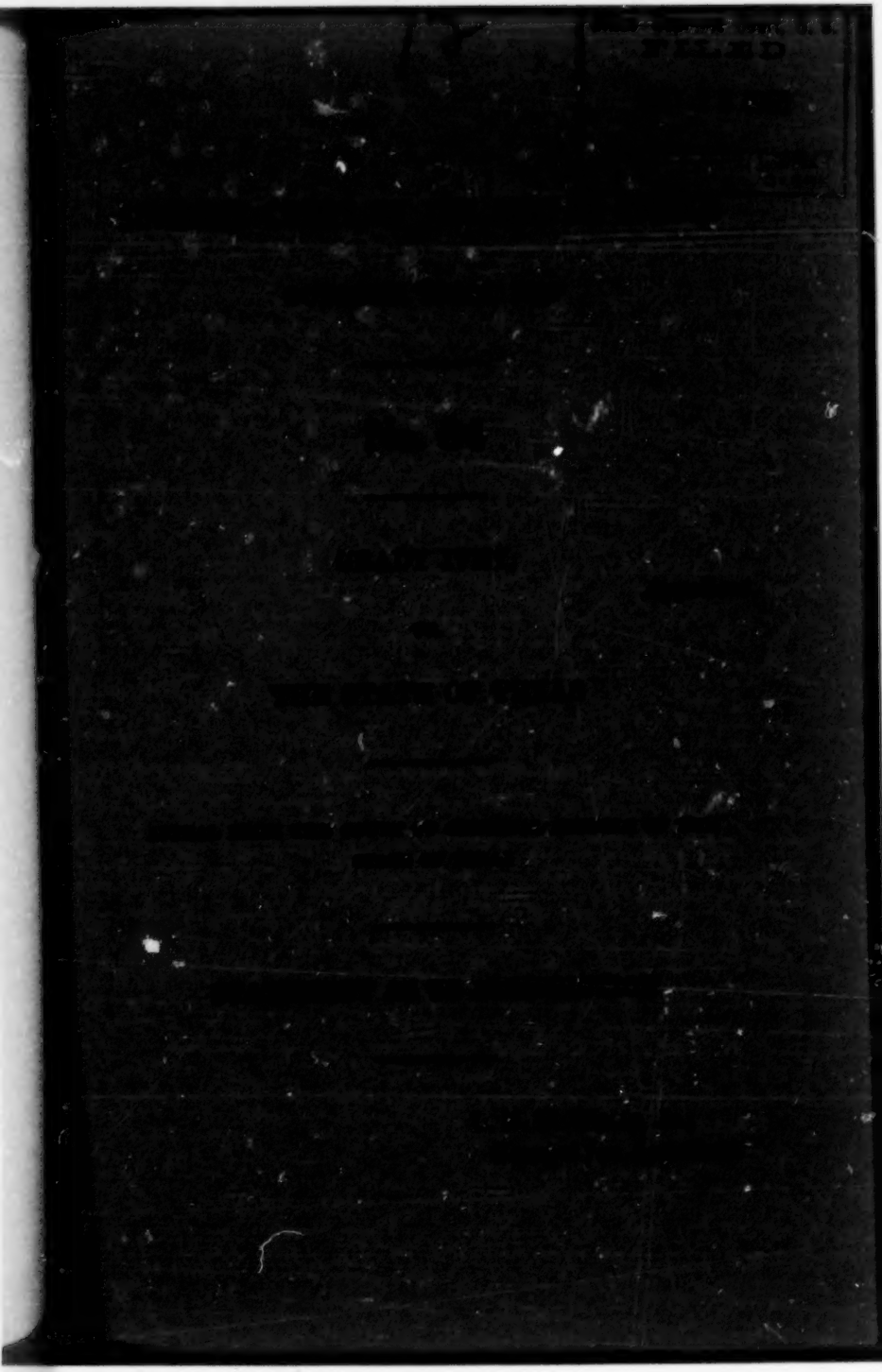

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IN THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 25,517

GRADY IVEY vs. STATE OF TEXAS

STATEMENT AS TO JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

Grady Ivey, sentenced as a felon to serve one year in the Texas penitentiary, and stripped of certain of his rights of citizenship by reason of his conviction of the offense of preventing another from engaging in lawful vocation under Article 1621b, Texas Penal Code; in compliance with Rule 12 of the Rules of the Supreme Court of the United States, submits herewith his statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the Court of Criminal Appeals of Texas entered in this cause.

Opinions Below

The opinion of the Court of Criminal Appeals of Texas was rendered December 5, 1951. The opinion on rehearing was rendered February 20, 1952. Second Motion for Rehearing was timely filed and denied without opinion on April 2, 1952. Neither of the opinions has yet been reported.

Jurisdiction

The final judgment of the Court of Criminal Appeals of Texas denying rehearing was entered on April 2, 1952. A Petition for Appeal is presented to the Honorable Harry N. Graves, Presiding Judge of the Court of Criminal Appeals of Texas, the Texas Court of last resort in criminal cases, on May —, 1952.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257 (2), inasmuch as the highest Texas Court in which a decision could be had has decided in favor of the validity of Article 1621b, Texas Penal Code, the validity of which was challenged by appellant under "equal protection" and "due process" provisions of the Fourteenth Amendment to the Constitution of the United States. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case. *LaCrosse Tel Corp.* v. *Wisconsin Board*, 336 U. S. 18, 69 S. Ct. 379; *Largent* v. *Texas*, 318 U. S. 418, 63 S. Ct. 667; *Tigner* v. *Texas*, 310 U. S. 141, 60 S. Ct. 879, 130 A.L.R. 1321; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 42 S. Ct. 106.

The Federal questions sought to be reviewed were raised in the trial court by "Motion to Declare Statute Unconstitutional and Invalid", presented to and overruled by the trial court prior to trial before the jury; and by Motion for New Trial overruled by trial court. The Federal questions sought to be reviewed were likewise assigned as error to the Texas Court of Criminal Appeals, re-urged on Motion for Rehearing (Paragraphs 18-23), and again re-urged in Second Motion for Rehearing (Paragraphs 1, 7, 8).

In its original opinion the Court of Criminal Appeals of Texas made no mention of the Federal questions. On re-

hearing the Court of Criminal Appeals of Texas noted that the Federal question was properly raised, viz:

> "Appellant contends that the statute (1621b, Vernon's P.C.), as here applied, constitutes a denial to him of equal protection of the law. This contention is based upon the proposition that a discrimination is made between a union and a non-union man under the same state of facts or circumstances."

However, the State court held that the statute and its application to appellant were valid (Opinion on Rehearing, pp. 1, 2).

Questions Presented

Whether Article 1621b, Texas Penal Code, may be validly applied to convict appellant striking union member of a felony, thus depriving him of certain incidents of citizenship, and subjecting him to penitentiary term on facts which as to a non-striker or non-union member could result only in conviction for misdemeanor?

In other words, does a State deny equal protection of the laws when it enforces state legislation against striking union members to provide for incarceration in the penitentiary and loss of citizenship, in circumstances under which non-strikers or non-union members are guilty only of misdemeanor?[1]

The Importance of the Questions Involved

Not only does the decision below sustaining the Statute as applied to appellant provide a different standard of punishment for the more than 300,000 Texans who are union members than that provided for the 7,000,000 other Texans; but the Texas statute has spawned identical statutes in sev-

[1] Several subsidiary points are raised in the Assignment of Errors, all of which are presented to this Court. The "Question Presented" stated above sets forth the major issue.

eral other states [2] and the construction of the statute now made by the Texas court may well be utilized by Courts of sister states applying identical statutes unless this Court makes clear that the union member and the striker, may not be dealt more severe punishment than any other citizen.

One facet of this question was presented in the challenge of this statute made in *Sanford* v. *Hill*, 316 U.S. 647, 62 S. Ct. 1292, where this Court held that the Statute (Article 1621b, Texas Penal Code) as interpreted by the Texas court in *Ex Parte Frye*, 156 S. W. 2d. 531 and *Ex Parte Sanford*, 157 S. W. 2d 899, did not present a substantial Federal question.

The constitutionality of the State statute was there saved by a construction placed upon the Statute by the State Court.[3] Of course, the State Court's construction was properly held to be binding on the Supreme Court.[4]

In the instant case the construction placed upon the Statute, saving its constitutionality, by *Frye* [5] and *Sanford* [6] decisions in the State Court was abandoned; and appellant is convicted of a felony on facts which if applied to non-strikers results in mere misdemeanor conviction.

In the *Frye* and *Sanford* cases we were assured that to justify felony conviction under Article 1621b, Texas Penal Code, proof would be required that defendant acted with intent and "for the purpose of preventing B from pursuing his occupation . . ." [7] The justification for more onerous penalty under 1621b than for mere assault was held to be

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[2] Act 193, Acts of Arkansas, 1943. *Cf. Cole* v. *Arkansas*, 333 U. S. 196, 338 U. S. 345, 70 S. Ct. 172. Section 2126, Mississippi Code, 1942, Annotated.

[3] *Ex Parte Sanford* (Tex. Crim. App., 1941), 157 S. W. 2d. 899; *Ex Parte Frye* (Tex. Crim. App., 1941), 156 S. W. 2d. 531.

[4] *Hotel etc. Employees* v. *Wisconsin Board*, 315 U. S. 437, 440, 441, 62 S. Ct. 706, 708; *Sanford* v. *Hill*, 316 U. S. 647, 62 S. Ct. 1292.

[5] *Ex Parte Frye* (Tex. Crim. App., 1941), 156 S. W. 2d 531.

[6] *Ex Parte Sanford* (Tex. Crim. App., 1941), 157 S. W. 2d 899.

[7] *Ex Parte Frye*, 156 S. W. 2d 531, 534.

solely because conviction of felony required proof of purpose and intent to prevent engaging in vocation, while no such purpose or intent need be shown to obtain misdemeanor conviction for assault.

If the Texas Courts had maintained this construction of the Statute, appellant could not have been convicted of felony—for in the instant case there is no evidence of purpose or intent to prevent another from engaging in lawful vocation.[8] We thus find the Texas courts abandoning the construction of the Statute by which attempt was made to save its constitutionality, and applying to strikers more onerous sanctions than are applied to other citizens.

In its first opinion in *Cole* v. *Arkansas*, 333 U. S. 196, 68 S. Ct. 514, Mr. Justice Jackson speaking for a unanimous court noted that petitioners there challenging the Arkansas statute identical to the Texas statute "raised *serious objections* to the validity of that section under the Fourteenth Amendment to the Federal Constitution" in urging the exact question at bar, viz: "that Act 193 deprived them of equal protection of the laws by making certain conduct, which otherwise would have been a misdemeanor, a felony when committed by striking workmen", 333 U. S. 196 at 202, 68 S. Ct. 514 at 517.

The question was not reached in that case since the judgment was reversed on other grounds.[9] The instant case is the first since *Cole's* case in which "serious objection" under the equal protection clause has been raised.

The Statute Involved

Article 1621b, Texas Penal Code, as amended by Chapter 100, Acts of 47th Texas Legislature; Vernon's Annotated

[8] See pp. 6-8, *infra*, for discussion and analysis of the undisputed evidence. Defendant did not testify, nor did he proffer witnesses. The entire case was made by the State's witnesses.

[9] On the second hearing of *Cole* v. *Arkansas* in this Court the equal protection question was neither raised nor decided. 338 U. S. 345, 70 S. Ct. 172.

Penal Code of the State of Texas, Article 1621b provides in Section 1:[10]

> "It shall be unlawful for any person by the use of force or violence, or threat of the use of force or violence, to prevent or to attempt to prevent any person from engaging in any lawful vocation within this State. Any person guilty of violating this Section shall be deemed guilty of a felony and, upon conviction thereof, shall be punished by confinement in the State Penitentiary for not less than one year nor more than two (2) years."

Statement of the Case

Appellant was convicted under Section 1 of the Statute above quoted, of preventing Henry Fennell from engaging in a lawful vocation, and sentenced to one year confinement in the Texas penitentiary. The felony conviction automatically deprived appellant of many of the incidents of citizenship, including the right to vote [11] and the right to hold office in a labor union.[12]

Conviction of assault, a misdemeanor, carries with it a penalty of "a fine not less than five nor more than twenty-five dollars" [13] and does not result in deprivation of any political or civil rights.

Appellant admits assault—for which if he were not a union member and a striker he would be fined "not less

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[10] The entire statute is set out in Appendix, *infra*.

[11] Texas Constitution, Article 6, Par. 1, disqualifies from voting those convicted of felony. Cf. Revised Civil Statutes of Texas, Article 2954, and *Harwell* v. *Morris* (Tex. Civ. App. 1940), 143 S. W. 2d 809.

[12] Article 5154, Revised Civil Statutes of Texas provides: "It shall be unlawful for . . . any person convicted of a felony charge to serve as an officer or official of a labor union or as a labor organizer . . ."

[13] Penal Code of the State of Texas, Article 1145. "The punishment for a simple assult or for assault and battery shall be a fine not less than five or more than than twenty-five dollars." Even "aggravated assault", i.e. assault "committed with deadly weapons" (Cf. Penal Code of the State of Texas, Article 1147) is not a felony. Punishment for aggravated assault is a fine of twenty-five to one thousand dollars or a jail term of one month to two years. Article 1148, Penal Code of the State of Texas.

than five nor more than twenty-five dollars." But appellant insists that a statute which declares strikers guilty of felony and provides a prison term and loss of incidents of citizenship for strikers who assault, while providing, as to others who assault only a $5 to $25 fine, denies equal protection of the laws.

The record at bar demonstrates the inequality of Texas' treatment of strikers *vis a vis* other citizens. The facts are undisputed from the mouths of the State's own witnesses. Defendant offered no testimony. We summarize the facts as disclosed by the undisputed testimony of the State's witnesses.

On Friday, January 4, 1951, employees of Weaver Iron Works, Inc. at Dallas, Texas, including appellant Ivey began a strike for higher wages. That afternoon complaining, witness Henry Fennell,[14] drove up to the plant entrance, parked his car and became engaged in conversation with several of the strikers including one Adams who asked Fennell not to go into the plant even to get his tools as it might give others the idea to go in. Fennell "got sore", stepped out of the car, grabbed striker Adams and wrestled around with him, and dragged him a rod or so until two or three of the strikers came and pulled Fennell off Adams.

Fennell was on this same day counselled by union representative Cook not to cross the picket line but to wait until his check was brought out to him (S.F. 9).

Appellant Ivey was not present during any of the above (S.F. 25). There is no showing that he had knowledge of such events.

Fennell had a reputation as a fighter and had had difficulties with both Adams and Ivey in the plant prior to the

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[14] Complaining witness Fennell is a big man, 6'1" tall, weighing 225 pounds, and in top physical condition. Striker Adams is 5'9" tall and weighs "around 160 pounds" (S.F. 20, 24).

strike relative to matters having no connection with the strike or the union.[15]

On the next work day after Fennell's assault on Adams, i. e. on Monday, January 8, 1951, Fennell and several other employees emerged from the plant in automobiles. At that time two union men, Sides and Green, carried picket signs by the plant gate. There was no one else at the gate (S.F. 55). Six cars went out the gate (S.F. 54). None was molested (S.F. 56), except the Fennell car.

The Fennell car with Henry Fennell in it stopped at the gate because of traffic (S.F. 29). According to Fennell, Charlie Adams approached the car where Henry Fennell was sitting and tried to open the door and called Henry Fennell a scab.[16] Joe Milam, the only other witness offered by the State, testified Adams did not stick his hand in the car (S.F. 71) and did not pull Fennell out of the car (S.F. 72).

Grady Ivey, appellant, also came across the street toward the car (he was not with Adams, S. F. 56)—to the driver's side of the car where Jimmie Fennell was driving. He said nothing to anyone so far as the record reflects or Henry Fennell knew (S.F. 29). There is no showing that Ivey knew that Adams called Fennell a scab (if he did do so) or try to open the car door (if he did).

In any event, Henry Fennell got out or was pulled out of

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[15] Fennell had been fired from his previous job for "fighting," which fact was "generally known and common gossip" (S.F. 25). Moreover, about two weeks before the strike Fennell had "some personal difficulty about getting material to Charlie Adams", and told several people in the plant that he was "kind of hot at Charlie Adams about a 'personal difficulty' which had nothing to do with the strike or the union. (S.F. 20-21). Also it appears that Fennell and Ivey had trouble in the plant prior to the strike relative to Fennell's failure to deliver material to Ivey, which had occasioned Ivey on several occasions to complain to Fennell's superior (S.F. 65).

[16] Henry Fennell's testimony on this point was rather thoroughly discredited by earlier testimony of his. Compare S. F. 31-35 with S. F. 77-80.

the car by Charlie Adams[17] and proceeded to grab Adams by his head and arms and wrestle him back some fifteen to eighteen feet behind the car when Ivey came around the rear of the car from the driver's side, struck Henry Fennell in the head with his fist, knocked Fennell to the ground and kicked at him several times, and jumped one time and hit Fennell in the face with his foot (S.F. 60). Then Ivey stepped over to Jimmie Fennell, who had in the meantime got out of the car and come around to where the fight was, struck him one blow with his fist and walked off. Mr. Cook, the union representative, had just walked up (S.F. 61), saw the difficulty, and said to Ivey, "That's enough, Grady; let's go."

Note that appellant Ivey is not shown to have said a single word—that Ivey was not present on the previous Friday—that the first time Ivey appears in the record is when Fennell and Adams were wrestling on Monday, when Ivey joined the affray and committed the assault as above described.

ARGUMENT

1.

The Application of the Statute to Sustain Felony Conviction of the Facts at Bar Denies Equal Protection and Due Process

The facts above recounted would justify a five to twenty-five dollar fine against Ivey under the Texas assault statute, Article 1145, Texas Penal Code. Any other non-striking citizen of Texas would likewise be punished by $5 to $25 fine on these facts. But the Texas Courts have here construed the Texas Statute (Article 1621b) to justify felony conviction, prison terms and loss of citizenship rights for appellant.

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[17] Fennell's own testimony was that ". . . I stepped out of the car and I caught hold of Charlie Adams." (S. F. 14).

This is a denial of the equal protection of the laws for the Fourteenth Amendment requires "that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights . . . and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such is prescribed to all like offenses. Class legislation, discriminating against some and favoring others is prohibited . . .", *Yick Wo* v. *Hopkins*, 118 U.S. 356, 367, 368.

Had Texas Courts maintained the construction of the Statute which the Texas Court held saved its constitutionality in *Ex Parte Frye*, 156 S. W. 2d. 531 and *Ex Parte Sanford*, 157 S. W. 2d. 899, appellant would not have been convicted of felony. For, there, to save the constitutionality of the Statute it was held that stiffer penalty was justified where there was shown the *intent to interfere with vocation.* Thus the Statute was construed to include as an essential element of the greater offense the existence of intent to interfere with vocation.

The instant record contains no proof of such intent. We have set out above what the record shows. The Texas Court draws therefrom the following "significant facts" which are held to be sufficient to support the conviction, (Opinion of Texas Court of Criminal Appeals, pp. 4-5):

> "1. On the Friday preceding the assault, Cook, the union representative, had counselled the injured party not to cross the picket line but to wait until his check was brought out to him.
>
> 2. On the same day, Adams had urged Fennell not to cross the picket line.
>
> 3. Adams and appellant stepped up to the Fennell automobile simultaneously as Fennell was leaving the plant.
>
> 4. Adams called Fennell a scab and assaulted him.
>
> 5. Appellant joined Adams in this assault and continued to assault Fennell after he and Adams had been separated.

6. That after the assault on Henry Fennell, appellant turned and knocked Jimmie Fennell to the ground.

7. Cook instructed appellant to refrain from continuing the assaults, and appellant complied with these instructions.

8. All this took place at a picket line while a strike was in progress."

It will be seen that "significant facts" Numbers 1 and 2 relate to activities of Cook and Adams, without Ivey's knowledge, authorization or ratification. Ivey's evil intent can not be shown by proof that Cook or Adams had such intent. Indeed, the imputing of criminal liability to one person for the independent acts of another is itself a deprivation of due process. "Guilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application." *Kotteakos* v. *United States*, 238 U. S. 750, 772, 66 S. Ct. 1239; Cf: *Schneiderman* v. *United States*, 320 U. S. 118, 63 S. Ct. 333; Cf. *Terminiello* v. *Chicago*, 337 U. S. 1, 69 S. Ct. 894. Only by application of the totalitarian principle of guilt by association may Ivey be bound by or held responsible for the statements of Cook or Adams.

"Significant fact" Number 3, is contrary to the State's own testimony, for as appears at S. F. 36, Ivey was not with Adams when the latter approached the Fennell car.

"Significant fact" Number 4, represents again an attempt to bind Ivey for statements of Adams made without Ivey's knowledge, authorization or ratification, indeed as Fennell admitted (S.F.29-30) out of Ivey's presence and hearing.

"Significant fact" Number 7, represents an unwarranted torturing of the undisputed evidence. The statement of Cook, the union representative, who had come up after the fight started, made to Ivey, "That's enough, Grady; let's go", is not fairly characterized as an "instruction (to) appellant to refrain from continuing the assaults".

We have demonstrated above that of these eight "significant facts", Numbers 1, 2, 3, 4, and 7 are either not supported by the record or represent an attempt to bind defendant by acts of others for whose acts he is not responsible in law. Deleting those "significant facts" we have left only items 5, 6 and 8, viz:

> "5. Appellant joined Adams in this assault and continued to assault Fennell after he and Adams had been separated.
> 6. That after the assault on Henry Fennell, appellant turned and knocked Jimmie Fennell to the ground.
> 8. All this took place at a picket line while a strike was in progress."

These facts would support a conviction for simple assault but cannot support a conviction under Article 1621b, and this indictment for the reason that the acts which constitute violation of this Statute are "not only directed against the person *but against his vocation for the purpose of preventing B from pursuing his occupation and to deprive him of the fruits of his labor.*" *Ex Parte Frye*, 156 S. W. 2d. 531 at 534, 1st. Par., Headnote 5.

There is no basis from the Court's findings of "significant facts", or elsewhere in this record to demonstrate that defendant assaulted Fennell *with the intent and for the purpost of preventing Fennell from engaging in a lawful vocation.*

The fact that the fight occurred at the picket line is no evidence of appellant's purpose or intent to prevent Fennell from engaging in a lawful vocation. Fights occur in front of churches, honky-tonks, theatres, business houses, etc. May a jury presume that a fight which occurred in front of a church was the result of the aggressor's purpose to hinder one coming out of the church from returning there? May a jury presume that a fight occurring in front of a "honky-tonk" was the result of the aggressor's purpose or intent

to interfere with one's return to such place? May a jury presume that a fight which occurs in front of a theatre is occasioned by the intent of one of the participants to prevent his fellow from entering and viewing the performance? To ask such questions is *reductio ad absurdum*. Without some additional evidence of intent or purpose, the mere occurrence of a fight at a particular place is no evidence as to why it occurred.

The only other possible basis for finding such intent or purpose in this case would be the presumption that all strikers or labor union members when they became involved in a fight during the course of a strike do so for the purpose and intent of preventing others from working. But to indulge such presumption is to place the burden upon the union member of disproving such intent or purpose, rather than to require the State to prove its case.

And of course such result renders the Statute unconstitutional as denying due process and equal protection of the laws to union members. Otherwise, Fennell's assault on Adams on Friday (from which several strikers had to pull Fennell off Adams, S. F. 24) would be presumed to be for a lawful purpose because Fennell was not a striker and not a union member. Clearer discrimination in violation of the constitutional assurance of equal protection of the laws would be difficult to imagine. In short, evil motives can not be presumed merely on the basis that defendant is a striker or a union member. For it is lawful to strike, and lawful to be a union member. And it remains with the State to plead and *prove* unlawful intent and purpose.

The State's assertion that it has proved intent or purpose to prevent engaging in a lawful vocation rests only on (1) The place where the assault occurred, or (2) The presumption which the State would indulge against all union members that their fights must be presumed to be for such purpose. But, such intent or purpose can never be presumed.

Screws v. *U. S.*, 325 U. S. 91, 65 S. Ct. 1031, at 1038f., 89 L. Ed. 1495; *Morrisette* v. *U. S.*, 72 S. Ct. 240, 246.

Moreover, a careful reading of *Ex Parte Frye*, 156 S. W. 2d. 531 at 534, Headnote 5, demonstrates that the only rationale by which this statute can be construed to afford equal protection of the law is that the acts which constitute violation of this statute differ from simple assault in that they are "not only directed against the person *but against his vocation for the purpose of preventing B from pursuing his occupation and to deprive him of the fruits of his labor.*" 156 S. W. 2d. 531 at 534, 1st. Par., Headnote 5.

Obviously, the constitutionality of the statute could not be saved by making such distinction; and at the same time obliterating the distinction by indulging the *presumption* that union members' assaults are for the purpose banned by this statute. For to indulge such presumption is to make the statute deprive union members of equal protection of the law and render the statute unconstitutional.

Put otherwise, the constitutional justification for making this offense a felony, and simple assault only a misdemeanor, is that to show violation of this statute a purpose or intent to prevent from engaging in a lawful vocation must be shown as an essential element of the crime. Whereas, in simple assault no such proof need be made. But for the Texas court to permit the jury to presume such purpose or intent, from the sole fact that defendant is a striking union member, is to obliterate the distinction between simple assault and violation of this statute, and to deny equal protection of the law to the striking union member. As Mr. Justice Jackson recently observed in commenting on the denial of certiorari in *Koehler* v. *Ackerman*, —U.S. —, 72 S. Ct. 75, 76.

> "This assurance of protection becomes a hoax if the requirement of specific intent is now to be wiped out with a presumption."

2.

Even Assuming Ivey's Unproved Intent the Statute Denies Equal Protection

We have demonstrated that even though the Texas court does not explicity disclaim the construction of the statute by which it held that the statutes' constitutionality was saved in *Frye's* and *Sanford's* cases, the application of the statute to the undisputed facts at bar, constitutes abandonment of the rationale of the *Frye* and *Sanford* cases, and finds the Texas statute effectively imposing more onerous penalty on strikers than on others.

That the Texas legislature intended the very application of the statute here made is quite apparent, for Section 6 of the statute, in stating its purpose makes clear that it was intended to protect industry from strikes. Legislative intent is baldly stated in Section 6 of the Statute:

> "The fact that it is essential that *industries* of this State *be protected* from *strikes* and that all citizens of this State be protected from the use of violence in labor disputes creates an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days be suspended, and it is hereby suspended, and this Act shall be in full force and effect from and after its passage, and it is so enacted." (Emphasis added.)

In the *Frye* case, Texas Courts camouflaged that intent and construed the statute to save it. But in the instant case it becomes clear that the statute now applies to a specific classification of workers, i.e. strikers. Is such classification reasonable? Take the specific example shown by this record: Ivey, who has gone on strike to better his working conditions, hits Fennell. For assaulting Fennell, Ivey goes to the penitentiary. Fennell who continues to work assaults Adams. For such assault Fennell, if prosecuted at all, pays a small fine. Both Ivey and Fennell have been guilty of

assault, even assuming that both assaults arose out of the same labor dispute, both occurred in the vicinity of the picketing at the plant gate, both occurred in substantially the same point of time. But the penalty against the striker is substantially heavier.

Thus considered and applied it appears that the Texas Statute as here applied requires the following anomalous result:

A (union member) gets in an argument with B (non-union member) in the vicinity of a picket line. The argument develops with respect to the merits or demerits of unionism. A fight results, blows are exchanged. Both men are at the same place and in substantially the same circumstances with reference to the labor dispute. But one man pays one penalty, while the other pays another, for doing the same identical act. This is not equal protection.

It is thus demonstrated that the statute, in fact accomplishes the purpose it declares on its face it is designed to accomplish—that is, to protect industry against strikes by placing a heavier penalty on strikers than on non-strikers for doing the same thing—*ipso facto* the law is discriminatory against men on strike.

The vice in the Texas statute is that under the thin camouflage of including all persons "engaged in a lawful vocation" it directs the Courts to impose one penalty upon men on strike and another penalty upon strike breakers who have taken their places. Such classification does not meet the equal protection test.

The distinction in treatment, here apparent, turns only on which side of the economic controversy is sponsored by the offender. If he is promoting an employer's interest, his conduct is penalized less than if he is promoting employees' interest.

Accordingly, the only possible rationalization of this discrimination is that the weight of Texas state policy is

on the side of employers in controversies with employees. And this orientation holds true regardless of the merits and ethics of the controversy and regardless of the public interests involved, whether the dispute was provoked by the employer, whether the employer brutally exploits his workmen, whether he uses force against them, and whether he violates Federal and State law in his dealings with them. The statute is not merely an instrument to deal with violence arising from tumultuous labor relations. It requires little sophistication to recognize that Article 1621b is not an anti-violence statute at all; it is an anti-labor statute. Texas had no rational basis for an assumption that in labor disputes strikers pose a greater threat to the State's peace than do employers or non-strikers.

The unreasonableness of classification as between persons who have left their vocation because of a strike, and those who are engaged in a vocation because of remaining in employment during a strike is at once apparent.

The voluminous reports of the LaFollette Committee,[18] cases reported in 96 volumes of the National Labor Relations Board Reports,[19] the research of independent scholars

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[18] See Digest of Senate Committee on Education and Labor pursuant to Senate Resolution 266 (Part IV), 76th Congress.

[19] See Third Annual Report of National Labor Relations Board, pp. 54, 55, where the Board's experience is summarized:

"In some cases the employer, for the purpose of disorganizing and defeating union activity, has sought to instigate or cause and commission of acts of violence against union organizers and leaders and union members. In one case an overseer of the company offered to buy an employee a gallon of whiskey if he would 'stamp hell out of' an active union employee. In another case, a forelady supplemented her attempt to dissuade employees from accepting union pamphlets by the following suggestion having reference to the organizer who distributed the literature: 'What do you say, girls, we give her a beating?' Marked conduct of this sort was revealed in *Matter of Clover Fork Coal Company*. The company and the Harlan County Coal Operators' Association, an employer organization of which the company was a prominent member, conducted a literal reign of terror against unionization. Union organizers were ordered out of the county at the point of guns; one organizer's hotel room was flooded with tear gas; another organizer, a minister, was shot at. The general superintendent of the mine told employees: 'If one of my men will pick up a stick and whip hell out of one of them organizers, I will * * * see

in the field [20] and cases decided by the Courts [21] all demonstrate that strike violence more often than not is initiated or provoked by employer, or employer-hired "guards" or "thugs".

National Labor Relations Board findings, confirmed by

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he don't put in a day in jail and I will pay the fine.' On another occasion he proposed that the men throw the union organizers into the river.

"In some strike cases, the employer not only sought to incite or did incite violence against union organizers and members, but in connection therewith sought to create a situation of general disorder in order to demoralize the striking employees and to justify appeals to 'law and order'. In *Matter of Remington Rand, Inc.*, large numbers of professional strikebreakers and operatives, known as 'missionaries', 'nobles', and 'undercover men', were hired by the company for such purpose. They jostled pickets and terrorized striking employes. In *Matter of Sunshine Mining Company*, supervisors fostered the formation of two strikebreaking organizations, the 'Vigilantes' and the 'Committee of 356'. Through them the company sought to enlist the intervention in the strike of local law enforcement agencies and the governor of the State. A mass demonstration was arranged by these organizations against the strikers, and handbills were distributed stating: 'Vigilantes are ready to take care of any radical organizers * * * ropes are ready.' Confronted by this situation the pickets disbanded before the demonstration was held. There then followed a victory celebration, with the company furnishing beer tickets good in any saloon. Violence occurred; in one instance, a supervisor led a crowd of about 400 men who attempted to lynch one of the strikers."

To the same effect, see later National Labor Relations Board experience as summarized in Seventh Annual Report of National Labor Rlations Board, pp. 42-43; Fourteenth Annual Report of National Labor Relations Board, pp. 50-51.

[20] Witte, *Government in Labor Disputes*, MacMillan, N. Y., 1932, pp. 190-194.

[21] *Great Northern Ry. Co.* v. *Brousseau*, 286 Fed. 414, where the Court finds:

"The danger of intimidation and attack is not confined to aggressions by strikers. *The impartial history of strikes teaches that there is as much danger to strikers on the picket line from private detectives and sometimes from new employees, as there is of the same kind of wrong on the part of strikers against new employees.* My experience in the present strike clearly confirms that view. The strikers on the picket line are entitled to have enough present to shield them against the temptation of their adversaries to resort to violent methods. They also need the same protection against trumped-up charges or unfair evidence relative to any assaults that may occur on either side."

This is Texas' experience. See *Hudson* v. *St. Louis S. W. Ry. Co.*, 293 S. W. 811, 295 S. W. 57, 17, S. W. 2d 793 (Tex. Sup. Ct., 1929) dealing with unprovoked killing of picketed by ranger employed by railroad. *Howitz* v. *Dickinson*, 25 S. W. 2d 966 (Tex. Civ. App., 1930), employer assaulting picket; *Gurtov* v. *Williams*, 105 S. W. 2d 328, error dismissed (Tex. Civ. App., 1937), employer inspired police interference with pickets.

the Court of Appeals in the *Ford Motor Co.* case, 26 NLRB 323-400 at 378, 380 of a "wave of violence" occasioned by *employer's "extreme and indiscriminate ruthlessness and organized gangsterism characteristic of the anti-union program executed in Dallas . . ."* likewise demonstrate the unreasonableness of a classification between strikers and strike-breakers, between ex-employees and present employees, between those without a vocation and those with a vocation. Such classification is obviously discriminatory and in violation of the equal protection clause of the Fourteenth Amendment, and, it is respectfully submitted that the legislation should be declared unconstitutional for that reason.

The State has not here legislated a heavier penalty against violence in labor disputes than it provides against violence in other connections. Such legislation might be a reasonable classification and a valid exercise of the police power. Article 1621b, however, is simply a case of the State's supporting one side of the quarrel without reference to the merits.

One final obviously invalid classification is inherent in the legislation, and that is the attempted distinction between persons having a vocation and persons having no vocation, when considered in connection with the asserted purpose of the legislation of protecting the public from violence. No good reasons have been suggested, nor is there any apparent, why persons having no vocation, whether the reason be because of unemployment, because of sickness, because of old age, because of voluntary retirement, or because of being on strike, should be afforded any less protection from force and violence than persons who have a lawful vocation. If the phrase "equal protection of the laws" has any meaning whatsoever, the protection from violence and force must extend equally to all classes of citizens. In the context of the present records this is merely to say that striker Adams who was assaulted by Fennell while Adams was engaged

in peaceful persuasion of the merit of labor's cause, is entitled to the same protection against violence while urging employees to honor the picket line, as is Fennell when engaging in his lawful vocation. The Texas statute fails to give this equal protection.

The application of the policy which underlies Article 1621b is, we submit, a deprivation of due process and the equal protection of the laws. If the Act is simply directed against industrial violence, then the classification it accomplishes of strikers on the one hand and employers and non-strikers on the other, bears no reasonable relation to the asserted legislative objective, and hence violates the equal protection of laws clause. *Bayside Fish Flour Co.* v. *Gentry*, 297 U. S. 422, 429; *Gulf C. & S. R. Co.* v. *Ellis*, 165 U. S. 150, 160, 161; *Skinner* v. *Oklahoma*, 316 U. S. 535. But if the objective of the Act is to throw the weight of the State against labor, without reference to any public interest, then it is an oppressive and discriminatory exercise of power which violates both due process and the equal protection of laws. The Act, in that case, can be sustained only if the following proposition is valid: the handicapping of labor is *per se* a legitimate objective for the exercise of state authority. Such a concept of government's functions is alien to our constitutional traditions.

Conclusion

We respectfully submit the questions presented are substantial and are of public importance, the appeal should be allowed and the judgment below should be reversed, with directions that the indictment be dismissed.

Respectfully submitted,

MULLINAX, WELLS & BALL,

By (S.) L. N. D. WELLS, JR.,

1716 Jackson Street,

Dallas, Texas,

Counsel for Appellant.

May, —, 1952.

APPENDIX

ARTICLE 1621b

REVISED CIVIL STATUTES OF TEXAS

"An Act making unlawful the use of force or violence or threats thereof to prevent or attempt to prevent any person from engaging in any lawful vocation and providing penalties for the violation thereof; making it unlawful for any person acting in concert with other persons to assemble and prevent by force or violence any person from engaging in a lawful vocation and making it unlawful to encourage and aid such unlawful assemblage, and providing penalties for the violation thereof; defining the term 'labor dispute'; making the provisions of this Act cumulative of existing laws; and providing a severance or saving clause; and declaring an emergency.

"BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

"Section 1. It shall be unlawful for any person by the use or force or violence, to prevent or attempt to prevent any person from engaging in any lawful vocation within this State. Any person guilty of violating this section shall be deemed guilty of a felony, and, upon conviction thereof, shall be punished by confinement in the State Penitentiary for not less than one year nor more than two (2) years.

"Section 2. It shall be unlawful for any person acting in concert with one or more other persons to assemble at or near any place where a 'labor dispute' exists and by force or violence prevent or attempt to prevent any person from engaging in any lawful vocation, or for any person, acting either by himself, or as a member of any group or organization, or acting in concert with one or more other persons, to promote, encourage, or aid any such unlawful assemblage. Any persons guilty of violating this Section shall be deemed guilty of a felony, and upon conviction thereof shall be punished by confinement in the State Penitentiary for not less than one year, nor more than two (2) years.

(2) ARTICLE 1621b

"Section 3. The term 'labor dispute' as used in this Act shall include any controversy between an employer and two (2) or more of his employees concerning the terms or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment.

"Section 4. The provisions of this Act shall be cumulative of all other existing Articles of the Penal Code upon the same subject, and in the event of a conflict between existing Articles and the provisions of this Act, then and in that event the provisions, offenses, and punishments set forth herein shall prevail over such existing Articles.

"Section 5. If any section, paragraph, clause, or provision of this Act is declared unconstitutional, inoperative, or invalid by any Court of competent jurisdiction, the same shall not affect nor invalidate the remainder of this Act.

"Section 6. The fact that it is essential that *industries* of this State *be protected* from *strikes* and that all citizens of this State be protected from the use of violence in labor disputes creates an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days be suspended, and it is hereby suspended, and this Act shall be in full force and effect from and after its passage, and it is so enacted."

Appeal from Dallas County.

No. 25,517

Grady Ivey, Appellant,

v.

The State of Texas, Appellee.

OPINION

The offense is preventing another from engaging in a lawful vocation as denounced by Article 1621b, Penal Code; the punishment, one year in the penitentiary.

The injured party, Henry Fennell, testified that for some three years prior to the month of January, 1951, he had been an employee of the Weaver Iron Works in Dallas; on the 5th day of that month when he came to work, he noticed a group of his fellow employees and a Mr. Cook, the union representative, gathered outside the gate, and he was informed by them that a strike had been called. Fennell related that he did not then cross the picket line but that he did return to the plant in the afternoon to get his check and get his tools, at which time Cook told him that the checks would be brought to the gate. Fennell stated that, while there, one Adams, a fellow employee, came up to the automobile in which he was seated and indicated his desire that Fennell not cross the picket line even to get his tools, stating that by so doing he might cause others to go in the plant and go to work. At this juncture, Fennell testified that he and Adams had a slight altercation and were separated by their fellow employees.

Fennell related that on the Monday following he and his 17-year old brother, Jimmie Fennell, who also was employed at the plant, returned to work and crossed the picket line. At the close of the day, as he and his brother prepared to leave the plant, he testified the same Adams came up to his side of the automobile, and the appellant approached the same from the opposite side where Jimmie was seated. Adams called Fennell a scab and opened the door next to which he was seated. According to Fennell, he closed the door two or three times; Adams opened it again each time, finally grabbing Fennell by the arm, causing him to come out of the car. Fennell testified that he and Adams struggled, though not exchanging blows, back into the plant enclosure, that something hit him from the side and knocked him unconscious, and that when he came to he was carried to the doctor.

One Milam, who was employed by another firm within the same plant enclosure, testified about Adams' actions, as heretofore related by Fennell and, further, that the appellant had followed Adams and Fennell and hit Fennell twice. Milam stated that at this juncture he personally interceded, pulled Adams away from Fennell and that thereafter the appellant continued to hit Fennell until he fell to the ground.

Milam further related that appellant stomped Fennell in the face with his cowboy boot as he lay prone on the ground and that he desisted when Cook said, "That's enough, Grady, let's go."

Medical testimony was introduced showing that Fennell's cheekbone had been fractured in the assault.

We come now to a consideration of the sufficiency of the indictment. Omitting the formal parts, the indictment alleged:

> ". . . use force, threats and violence by striking and beating with his hands, and kicking and stamping with his feet the said Henry Fennell, and in doing so prevented and attempted to prevent the said Henry Fennell from engaging in *an* lawful vocation at the Weaver Iron Works, Inc. in Dallas County, Texas."

It is contended that the indictment is fatally defective in that the word "did" is omitted from the beginning of the above quoted portion of the indictment.

In Branch's Texas Annotated Penal Code, Section 492, we find the following: "The word 'did' is an essential word in indictments, information and complaints, where the acts which constitute the offense are being set forth." In each of the cases set forth thereunder, we find that the use of the word "did" was essential to the certainty necessary in the description of the offense. However, we feel that the case at bar, by virtue of the presence in the indictment of the phrase "in doing so", brings itself within the rule set forth in Section 493 of the above, which is stated as follows:

> "If, eliminating surplusage, the indictment so avers the constituent elements of the offense as to apprise defendant of the charge against him and enable him to plead the judgment in bar of another prosecution, it is good in substance, under our Code, and therefore sufficiently charges the offense."

It is further contended that the indictment herein should have charged that such assault and violence used by appellant upon the complaining witness was thus used with the intent to prevent such witness from engaging in such em-

ployment, the gist of the contention being that the word "intent" should have been utilized in this charge. With this proposition, we cannot agree. It is not in every charge of violence that it is necessary to charge the intent with which such violence was used. It would be a redundant allegation to say that such violence was with the intent to attempt to prevent. As illustrative of such matter, we cite Article 1190, Penal Code, which denounces an attempt to commit rape. It would be necessary under such latter charge to prove that the intent was to commit rape; nevertheless, the statute and the decisions thereunder do not require the word "intent" to be used in an indictment relative thereto. We think the word "attempt" carries with it the "intent". We see no ground for objection to such indictment. See notes and decisions under Article 1190, *Penal Code,* and also Form No. 258, Willson's *Criminal Forms,* (5th Edition), p. 319.

In Adams v. State, 163 S.W. (2d) 410, we approved the form of the indictment as against the other complaints raised in the motion. In the motion there, we find several of the same points as are raised by appellant here. We conclude that the indictment contains the essential elements denounced by the statute.

Appellant challenges the sufficiency of the evidence to support the conviction. His contention is that the State failed to show that at the time appellant assaulted Fennell he had the specific intent, design and purpose of preventing or attempting to prevent Fennell from engaging in a lawful vocation. Appellant lists some eleven other possible reasons, which he claims are raised by the evidence, that could have motivated appellant in assaulting the prosecuting witness other than to prevent said witness from engaging in a lawful vocation. Appellant asserts that the duty lay upon the State to negative these in its proof and argues that such was not done.

This contention was ably presented to the jury in that portion of the court's charge which reads as follows:

> "You are further charged that even though you may find and believe from the evidence beyond a reasonable doubt that the defendant used force or violence, as set

out in the indictment, upon the person of Henry Fennell yet you cannot convict the defendant under the indictment in this cause unless you further find and believe from the evidence beyond a reasonable doubt that such force or violence used by the said Grady Ivey, if any be used, was with the intent and for the purpose of preventing the said Henry Fennell from engaging in a lawful vocation; therefore, you are instructed that if you should find and believe from the evidence beyond a reasonable doubt that the defendant, Grady Ivey, used force or violence, as set out in the indictment, upon the person of Henry Fennell at the time and place described in the indictment but you further find and believe from the evidence that at the time the defendant used such force or violence upon the person of Henry Fennell, if any he used, that such force or violence, if any, was not used for the purpose to prevent or to attempt to prevent the said Henry Fennell from engaging in a lawful vocation at the Weaver Iron Works, Inc., in the County of Dallas, and the State of Texas, or if you have a reasonable doubt thereof, then, you will find the defendant not guilty."

To this Court, the following facts are significant.

1. On the Friday preceding the assault, Cook, the union representative, had counselled the injured party not to cross the picket line but to wait until his check was brought out to him.

2. On the same day, Adams had urged Fennell not to cross the picket line.

3. Adams and appellant stepped up to the Fennell automobile simultaneously as Fennell was leaving the plant.

4. Adams called Fennell a scab and assaulted him.

5. Appellant joined Adams in this assault and continued to assault Fennell after he and Adams had been separated.

6. That after the assault on Henry Fennell, appellant turned and knocked Jimmie Fennell to the ground.

7. Cook instructed appellant to refrain from continuing the assaults, and appellant complied with these instructions.

8. All this took place at a picket line while a strike was in progress.

From these, we deem the evidence sufficient to support the conviction.

Bill of exception No. 1 complains that, while questioning the jury panel, the prosecutor, in stating the essential elements of the offense charged in the indictment, failed to incorporate the element of specific intent. The court's qualification of the bill shows that, during the course of appellant's examination of the panel, each juror assured him that they would require a showing of specific intent on the part of appellant to prevent the injured party from engaging in a lawful vocation. Attention is further directed to the court's charge set forth above herein.

Bill of exception No. 2 is in question and answer form without a certificate of the trial court authorizing the same. It will be further noted that it presents five objections and a like number of rulings by the court, and is therefore multifarious and cannot be considered. Texas Digest, Criminal Law, 1091(14) and 1092(14)c.

We come now to a consideration of appellant's bystanders' bill of exception. It relates to the closing argument of the prosecutor.

We do not condone the argument, but the same must be brought forward for our review in accordance with the law. The bystanders' bill reflects four separate portions of the argument, the objections to three parts thereof, and the rulings of the court thereon, and therefore comes within the rules set forth above.

"Furthermore, there is no allegation that the argument thus made was not invited and not in response to any argument made by the defense attorney." Barnett v. State, 216 S. W. (2d) 218, and cases cited there.

For the reasons set forth, the bill cannot be considered.

Finding no reversible error, the judgment of the trial court is affirmed.

Graves, *Presiding Judge*

(Delivered December 5, 1951)

Appeal from Dallas County

No. 25.517

GRADY IVEY, *Appellant*

v.

THE STATE OF TEXAS, *Appellee*

OPINION

On Appellant's Motion for Rehearing

At appellant's insistence we have again examined the complaints registered against the indictment, and we remain convinced of the correctness of our original opinion.

We do not agree with appellant in his contention that a variance exists between the allegations of the indictment and the proof—that is, that the indictment alleged interference with a lawful vocation at Weaver Iron Works, Inc., while the proof shows interference with a lawful vocation at Lawrence Warehouse Company. We again call attention to the testimony of the injured party, Fennell, to the effect that he was employed and paid by the Weaver Iron Works. This testimony supported the allegations of the indictment and was authorized to be accepted and believed by the jury.

Appellant contends that the statute (1621b, Vernon's P. C.), as here applied, constitutes a denial to him of equal protection of the law. This contention is based upon the proposition that a discrimination is made between a union and a non-union man under the same state of facts or circumstances.

This prosecution is based upon Sec. 1 of Art. 1621b, P. C., which has no reference to labor unions or members thereof or to labor disputes. By that statute, all persons violating its provisions are guilty. No exception is contained in the statute. The fact that this prosecution arose out of a labor dispute or involved union and non-union individuals could not affect the constitutionality of the statute or render the application here made a denial of equal protection of the law.

In Ex Parte Frye, 156 S. W. 2d 531, we held that the intent to prevent one from engaging in a lawful vocation is an essential element of the offense for which appellant has been here convicted—and this, notwithstanding the fact that such intent is not expressly written into the statute. The correctness of that conclusion finds support by the Supreme Court of the United States in the recent case of Morissette v. United States, 96 L Ed. (advance opinion), 180, where, in a federal statute, intent was held to be the essential element although not specifically set forth therein.

We held, originally, the allegation of intent to be sufficiently alleged in the indictment by the use of the words, "attempted to prevent the said Henry Fennell from engaging in a lawful vocation." In addition to what was there said, the conclusion reached finds support in the case of Fowler v. State, 66 Tex, Cr. R. 500, 148 S.W. 2d 576, where a conviction for assault with intent to rape was sustained upon an indictment alleging that the accused did "attempt to ravish and have carnal knowledge of the said" female. It was there held that the use of the word, "attempt" in lieu of the word, "intent," was sufficient to charge assault with intent to rape, upon the theory that the only distinction between an "intent" and an "attempt" to do a thing is that the former implies the purpose only, while the latter implies both purpose and actual effort to carry that purpose into execution.

Appellant's motion for rehearing is overruled.

Davidson, *Judge*

(Delivered February 20, 1952.)

Opinion approved by the court.